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No. 94

In The

Supreme Court of the United States

October Term, 1951.

AGAPITA GALLEGOS, PETITIONER,

v.

STATE OF NEBRASKA, RESPONDENT.

BRIEF OF RESPONDENT.

CLARENCE S. BECK,

Attorney General State of Nebraska,

WALTER E. NOLTE,

Deputy Attorney General,

HOMER L. KYLE,

Assistant Attorney General,

Counsel for Respondent.

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OPINION BELOW.

The sole opinion heretofore delivered in the instant case is *Gallegos v. State*, 152 Neb. 831, 43 N.W. (2d) 1, issued by the Supreme Court of Nebraska on June 15, 1950. The motion for rehearing in such case was overruled on November 4, 1950. The mandate was issued to the District Court of Scotts Bluff County on November 6, 1950.

JURISDICTION.

Jurisdiction of this court is claimed by reason of the petitioner's contentions that his right to counsel and to be presented before a magistrate guaranteed to him by the United States Constitution (Articles V and VI) were denied him in obtaining confessions of guilt, and that the use of confessions thus obtained upon his murder trial resulted in a conviction of manslaughter without due process of law in violation of the Fourteenth Amendment.

STATEMENT OF THE CASE.

I.

Questions Presented.

The questions for the court would appear to be as follows:

- A. Does the failure of state authorities to bring a state prisoner before a magistrate prior to obtaining a confession or admissions from him constitute a denial of due process sufficient to avoid the confessions and to render them inadmissible in evidence?
- B. Is a confession voluntarily given by a prisoner inadmissible simply because a period of confinement preceded or followed the giving of such confession?

II.

Statement of Facts.

Respondent accepts generally the statement of facts made by petitioner (Brief of petitioner, pages 3 to 8). It is felt that correction in a few material respects

should be made for such statement is rather argumentatively worded favorable to petitioner's contentions. The record demonstrates the petitioner to be a mature Mexican national who does not speak or read English. The record shows that the questioning of the first two days was solely for the purpose of identifying the accused (R. 81, Q. 1538) and was by one officer in accused's native tongue. The record contains severe doubt that the prisoner was ever placed in the unfurnished, unlighted room, but from petitioner's own description of the room as "next to the office", it is more fairly inferred that he was never placed in such a room (R. 98, Q. 1690). The statement on page 3 of petitioner's brief that petitioner was reincarcerated because he failed to make an incriminating statement is not sustained by the record except as it may be incriminating to divulge a person's true name. Petitioner gave and adhered to the name of Francisco (a girl's name [R. 87, Q. 1597]) Gallegos. Petitioner's statement of facts broadly indicates duress during the first three days of confinement by Texas officers. The record indicates that these procedures (not conceding that any duress is shown) were directed toward establishing his identity (R. 78, Q. 1498, 1499, 1500). The Texas officers spoke to the accused without interpreters (R. 60). The only fear accused entertained during any of his questioning while in Texas was a nervousness at "the first time that the law takes me" (R. 94, Q. 1659). Arrival in Scotts Bluff County, Nebraska, was early in the morning of September 29 instead of on September 28 (R. 106, Q. 1734). No mistreatment is claimed after the taking of Exhibit 10 (R. 108) to the time of trial but a dispassionate statement of facts should include petitioner's comment

in regard to this, to-wit: "I have not been promised, been abused or been given bad threats, I have been treated very nice thanks to God, up to the present time. (Exhibit 12, R. 128.)

ARGUMENT.

Summary of Argument.

1. The evidence in the record clearly demonstrates that the confessions and plea of the petitioner were voluntarily given and that no unconscionable duress was applied in their taking. No civilized standards of investigation were violated by the persons having custody of petitioner.
2. The mere fact that a confession is obtained while a prisoner is in custody does not render such confession invalid or inadmissible in evidence.
3. Under state procedures the time within which a prisoner must be brought before a magistrate depends upon the circumstances of the particular case and the reasonableness of such time is a matter for determination by the state court.

I.

The State of Nebraska appears without shame in the instant case and makes no apology for, in fact feels no apology is required for, its sister State of Texas. To demonstrate the complete reasonableness of petitioner's custody and interrogation we will present at the risk of some repetition a narrative of events. We first observe that petitioner's brief intimates to this court that petitioner is a helpless, ignorant peon caught in a strange land where a tongue which he does not

understand is spoken. We point out that Gallegos is not a feeble old man but a successful thirty-eight year old Mexican laborer who came repeatedly across the Rio Grande to Nebraska to engage in labor and who earned considerable sums of money in this country. Each time he entered he entered illegally and he returned after work periods in this country to his homeland. On his second trip to Nebraska he brought another illegally-entering Mexican, Genovesa Carillo. With her he entered upon the meretricious relationship of common law husband and wife. During what was at least his third illegal period in this country immigration authorities requested a Texas sheriff to apprehend him. The course of his arrest, confession, and detention appear to be particularly natural and normal in view of the distances and other complications involved in the arrest of a so-much-travelled laborer:

A. The arresting officer talked to him briefly and placed him in a small room temporarily. He was recalled the same day for questioning and urged to tell the truth pertaining to his identity. It is inferable (though denied) that a lie detector was mentioned when the accused continued to use an alias.

B. He was not questioned on the second day but was fed and given cigarettes and 50¢. He was questioned on the third day, again as to his identity. He was never questioned at any odd or unusual hours and never for any sustained periods. On the third day he admitted his identity. No charge in the Texas courts was ever made against him except vagrancy. His greatest fear seems to have been that he would be returned to his country

and turned over to authorities there. This fear of being handed over to Mexican authorities is one which must at all times be held by all Mexicans who cross the Rio Grande without proper authority. If it is increased by arrest here in this country that is a situation for which neither the State of Nebraska nor the State of Texas is responsible.

C. On September 23, the fourth day he confessed to a murder in the State of Nebraska which he, for the first time, described. He gave such details as the location of the body in Scotts Bluff County, Nebraska. His confession (Exhibit 10, R. 103) was of such nature as to indicate first degree murder committed out of jealousy of the woman with whom he was living in adultery in the presence of his two children. Authorities in Nebraska were notified, some of the facts were verified and a first degree murder charge was filed in Nebraska on September 23. An officer was dispatched to pick up the prisoner. He travelled by bus.

D. On September 27 the actual custody by Nebraska authorities commenced. Prior to this point the prisoner could not have been charged in Texas with the crime which he revealed. He rode by bus with the Nebraska sheriff to Gering, Nebraska, and arrived far past midnight on September 29. His counsel complains apparently that he was not questioned early the next day. Under the cases of this court it would be more nearly an unconscionable interrogation if he had been aroused early than as in this case allowed to rest throughout the next day. He was given cigarettes

and food in a clean cell. On October 1st while still charged with first degree murder he was questioned again with more particularity. The circumstances of this questioning were entirely regular and should not be an honest subject of complaint unless the prior imprisonment made them involuntary.

His statement here given indicated a murder somewhat lesser in degree since the element of jealousy was not prevalent therein. The petitioner was returned to his cell.

E. Prosecuting attorney must then, under Nebraska law, quoted in the opinion below, arrange for a preliminary hearing. It is obvious that at this preliminary hearing the first confession may be necessary. This will require attendance of an officer residing in El Paso, Texas, and will require arrangements for his passage to Nebraska. The nomadic habits of the defendant brought about the situation calling for this repeated travel. Gallegos did not remain in the state and county of his almost perfect crime but slipped away to Texas some 1000 miles away and 30 hours by bus.⁽¹⁾ An additional period of ten days of normal jail confinement in the absence of any request for release or for the right to see an attorney, priest, a friend, or anyone else does not seem too long in view of the physical acts which needed to be accomplished. To hold otherwise would be to read the United States Constitution as requiring that a person charged by one of the states must be

(1) Information furnished by Union Bus Depot, Lincoln, Nebraska.

given a hearing before a magistrate at a time and place when inadequate evidence can be presented, a hearing calculated to release the prisoner in all cases where he has reached a point distant from his crime.

It is true that the laws of Nebraska provide that only the district court (Appendix II) may appoint counsel. This is a matter upon which the legislature of the state should be entitled to speak and it is preferred in Nebraska to have a competent attorney (and certainly such an appointment was made in this case) appointed by a district judge rather than to permit the jailer, the prosecutor, or the sheriff to select a court-hanger-on or incompetent attorney to obtain a politically expedient conviction. Under Nebraska law the prisoner may have made some admissions or even one preliminary plea before counsel at the state's expense is available to him but he does not make such a plea before any court competent to docket a conviction upon his record and he is entitled to have the circumstances or plea passed upon by a jury selected in the neighborhood of a crime and he is entitled to have the jury pass upon the truth of such confession as opposed to the plea of "not guilty" which he then makes or as opposed to the story which he determines to tell in his defense. So in this case the prisoner first appears with counsel on October 15th and repudiates his former plea. The jury under instructions which are not complained of here found the confessions and the plea to have been voluntarily made as is proper under the law. That has been the way the law works in Nebraska ever since criminal procedure was first provided for in her constitution.

and laws. It was the law of Nebraska when Agapita Gallegos determined he would prefer working in Nebraska to remaining in his home land. He has been tried and convicted under that course of judicial administration. See

Kitts v. State, 151 Neb. 679, 39 N. W. (2d) 283 and cases cited therein.

We urge that there is nothing in the conduct of Texas state authorities as disclosed by petitioner's testimony which indicates any undue duress or improper questioning in the very brief time petitioner was held there. It is well known that many criminal cases are capable of solution only by complete confessions or by admissions which lead to the discovery of physical facts disclosing crime. It is also well known that those who have committed crime are usually not proud of such fact and do not normally notify authorities to that effect. It is further well known that in sorting out the actually guilty from the actually innocent methods of questioning, somewhat less delicate than used in ordinary conversation, may be required. The foregoing narrative argument was indulged in because to reduce this matter to its purest form it was felt necessary to demonstrate that no actual undue periods of time are involved in this cross-country case. Counsel for petitioner repeatedly state "twenty-five days" with respect to the first confession, "twenty-five days" with respect to the second confession and "twenty-five days" with respect to the arraignment. A true analysis brings up the following schedule:

Item	Date & Time	Elapsed Time	Conditions
Arrest	September 19th	None	No unusual aspects claimed.
First Confession (Exhibit 10)	September 23rd	Four Days	*Questioning for brief periods during three of the days. Different cells, claimed threat of Lie Detector Use, claimed threat of turnover to Mexican Authorities all in search of identity. No fear of bodily injury. Advised that statement would be used against him.
Wait	September 24th - 27th	Four Days	No ill treatment, confinement in "bull pen."
Travel	September 27th 28th and 29th (to 1:00 A. M.)	Three Days	No complaint of treatment during travel with Nebraska Officer.
Second Confession (Exhibit 12)	October 1st	Two Days	Interpreter obtained in Colorado. No previous questioning. Statement taken with full cooperation of accused. Advised of use of statement against accused. Followed by trip to scene of crime. No complaint of treatment in Nebraska.
Preliminary Hearing	October 13th	Twelve Days	Accused incarcerated in Nebraska jail. No complaint of treatment. County judge (by interpreter) causes full explanation of proceedings to accused.

*Even by accused's description the rooms became progressively more comfortable as he continued to deny his identity. It seems obvious that this is not a method of forcing an untrue confession for when he finally confessed to the crime he was in an adequate pleasant cell.

The time of detention was held by the court below to be reasonable and not to have affected its admissibility. This was not a special decision for Gallegos but a reiteration by the court of a long standing rule. See *Maher v. State*, 144 Neb. 463, 13 N. W. (2d) 641. It has already been pointed out in this court that any abuses of due process of law habitually or even occasionally carried on by Texas law enforcement officers can be rectified by local vigilance, punished by local law, compensated for by civil suit and escaped from by habeas corpus. See how well fit the words of Mr. Justice Jackson in his concurring opinion in *Watts v. Indiana*, 338 U. S. 49, at page 60:

**** Sometimes, as here, more than one crime is involved. The duration of an interrogation may well depend on the temperament, shrewdness and cunning of the accused and the competence of the examiner. But assuming a right to examine at all, the right must include what is made reasonably necessary by the facts of the particular case.

"If the right of interrogation be admitted, then it seems to me that we must leave it to trial judges and juries and state appellate courts to decide individual cases, unless they show some want of proper standards of decision. I find nothing to indicate that any of the courts below in these cases did not have a correct understanding of the Fourteenth Amendment, unless this Court thinks it means absolute prohibition of interrogation while in custody before arraignment.

"I doubt very much if they require us to hold that the State may not take into custody and question one suspected reasonably of an unwitnessed murder. If it does, the people of this country must discipline themselves to seeing their police stand by helplessly while those suspected

of murder prowl about unmolested. Is it a necessary price to pay for the fairness which we know as 'due process of law'? And if not a necessary one, should it be demanded by this Court? I do not know the ultimate answer to these questions; but, for the present, I should not increase the handicap on society."

Lest the court—as did the dissenting opinion of Mr. Justice Murphy at page 41 of *Wolf v. Colorado*, 338 U. S. 25—feel that these remedies are fictitious and inadequate as applied by the states, we remind the court that the United States Congress has enacted, and this court has repeatedly enforced, Federal laws which provide for relief from such oppression or other denial of civil rights under color of state law or authority. See Title 3 U. S. C. A. sections 43 and 47, and Title 28 U. S. C. A. section 1343 for both criminal and civil provisions. See also *Picking v. Pennsylvania R. Co.* (3rd Cir.) 151 F. (2d) 240, as to the civil relief afforded and *Screws v. United States*, 325 U. S. 93, for a criminal prosecution.

It is our earnest contention that civilized procedures have not been affronted by the treatment of Gallegos. It is obvious that his first confession did not result from twenty-five days of oppression. It is also obvious that his second confession was taken in completely voluntary circumstances at the earliest date convenient (when it is recalled that an interpreter needed to be obtained) to the law enforcement officials and courtesy (considering the long bus ride) to the accused. It is equally apparent that ten days of further delay in the setting of a preliminary hearing to which witnesses from more than a thousand miles distance must attend is not improper if unaccompanied by ill-treat-

ment or oppression of the prisoner, and the clearly willing cooperation of Gallegos and his description of his treatment show no denial of due process at all.

II.

It is incredible that this court granted certiorari in this case with a view to adopting a rule which will hold invalid any admission or confession made while in custody. To hold that such confession vitiates a prosecution for lack of due process of law will flood the court's of the forty-eight states and of all of the districts of the United States Court system with habeas corpus proceedings from innumerable petitioners who, after apprehension and in-custody questioning, have assisted law enforcement officers in the solution of crime even to the extent of inculpating themselves.

Petitioner's brief (counsel being a county attorney in this state) shows an awareness of this situation on page 18 of his brief where he devotes a paragraph to assuring this court that interrogation, being necessary, should not be forbidden by rule of court. Yet to reverse this case the court must either greatly exaggerate the events which preceded the questioning or adopt just such a rule. Let us examine the normal situation when return of a prisoner is sought under the uniform extradition law. A man commits a crime in McCook, Nebraska. A warning is placed in motion throughout the intricate enforcement agencies circuit. The man is picked up in Pennsylvania, where the sole charge against him is that he is a fugitive from Nebraska. He is held upon this charge with a date set for the hearing upon this charge or is permitted to

arrange bond if he requests this privilege. The governor's requisition from Nebraska is expedited to the point where it takes merely two or three days. The governor's warrant from Harrisburg, Pennsylvania, if expedited, may take another two or three days. The officer in western Nebraska upon being assured that a warrant has issued departs Nebraska for Pittsburgh, is given the prisoner's custody after an additional 48-hour period elapses to permit habeas corpus if desired. We must then assume that since a period of from six to seven days (Gallégos was enroute home four days after Nebraska authorities even heard about the murder) was physically necessary in order to put the prisoner on the road back to the scene of his crime that he may tell the returning sheriff all about his crime on the 1500 mile return trip and then be immune from testimony which confronts him with his admissions. Admissions in just such a case were admitted in State v. Wilshusen, 149 Neb. 594, 31 N. W. (2a) 544. We feel it safe to say that the same process is going on all over this land at the present time and that prisoners who are apprehended in places wheret they are unfamiliar with attorneys or bondsmen, they remain seated in their cells until they are picked up by the returning officer. How it would help to bring them before a magistrate in the city where they cannot be charged with their crime is more than we can comprehend and we do not feel that the suggestions contained at page 15, lines 24-32 in the petitioner's brief that a prisoner would thereby immediately become familiar with court proceedings are tenable in any but the most rhetorical sense.

Respondent does not argue this second phase purely to keep writs of habeas corpus from flooding our courts. We urge that the hand of law enforcement should not be handcuffed by imposition of a rule, not deemed necessary in years of jurisprudence on this side of the Atlantic Ocean, which will forever preclude the use of even the most willing confessor's statement. As pointed out numerous times to this court the statute which made the McNabb case rule a fact in the federal jurisprudence was passed for the purpose of deterring unlawful raids upon the public treasury by unscrupulous United States officials and nowhere in its passage was it indicated that due process of law required a hearing near the point of apprehension rather than near the scene of the crime. We are cognizant of the decisions of this court in *Turner v. Pennsylvania*, 338 U. S. 62; *Watts v. Indiana*, 338 U. S. 49; *Harris v. South Carolina*, 338 U. S. 68, and the very complete analysis which the various justices saw fit to make gives us cause to feel presumptuous at exploring the principles therein decided. We earnestly believe that the onerous elements of oppression which impelled this court to be revolted by official conduct in the Watts case, the Turner case and the Harris case will not be found in any fair search of this record. In each of those cases the court found protracted police interrogation. In each case the interrogation was at odd hours and was accompanied by processes which smacked of trial by ordeal. We are at loss to distinguish the vague line marking out the area within which this court feels (or should feel) that a state may be trusted in this phase of Due Process Clause as it respects many of the guaranties of the Federal Constitution and the area within which the states may

not be trusted with respect to the obtaining of self-incriminating information. Text writers prior to and after the decisions of this court which were issued on June 27, 1949, profess equal uncertainty⁽¹⁾ but no one can examine the opinions, and the vigorous dissenting comments, without an awareness that this court within the individual conscience of the human beings which compose it is attempting to maintain in the United States a civilized decency for all who are within its borders. Those standards must be maintained but also must be malleable enough to maintain a system of enforcement of the laws and at the present time this entails a system of punishment for the violators of the law. We find that the succinct observations of members of this court either in opinions or dissents have exhausted the argument and we necessarily borrow therefrom:

Mr. Justice Frankfurter, in *Niemotko v. Maryland*, 340 U. S. 268, 95 L. Ed. 263, stated as follows:

“A state court cannot of course preclude review of due process by merely phrasing its opinion in terms of an ultimate standard which in itself satisfies due process. *Watts v. Indiana*, 338 U.S. 49, 50 * * * But this Court should not re-examine determinations of the State courts on ‘those matters which are usually termed issues of fact’ * * * And it should not overturn a fair appraisal of facts made by State courts in the light of their knowledge of local conditions.”

(1) Orfield, *Criminal Procedure* (N. Y. U. Press) page 62.
Wigmore Evidence, Vol. 3, Secs. 851 and 852 (1949 Supp.)
American Jurisprudence, Vol. 14 (Criminal Law) Sec., 120-124
(1950 Supp.)

We feel that this court should, except in cases of such flagrancy as will outrage the conscience of the court, leave to the states the procedural requirements for protection of accused persons. In this connection we point out that there has not been alleged or included in this record any indication that there was in the area where Gallegos was tried any hostility toward him, toward Mexican nationals, or in any other respect material hereto. The reasoning adopted by this court in *Adamson v. California*, 332 U. S. 46, 68 and *Wolf v. Colorado*, 338 U. S. 25, 48 (also decided on June 27, 1949) is most applicable here. The former case involves a California rule permitting comment on the failure of the accused to testify. We use Justice Frankfurter's words with which we agree to press our point here:

"For historical reasons a limited immunity from the common duty to testify was written into the Federal Bill of Rights, and I am prepared to agree that, as part of that immunity, comment on the failure of an accused to take the witness stand is forbidden in federal prosecutions. *** But to suggest that such a limitation can be drawn out of 'due process' in its protection of ultimate decency in a civilized society is to suggest that the Due Process Clause fastened fetters of unreason upon the States. ***"

In that opinion the court adopted the view that the Fourteenth Amendment clearly did not inculcate the Federal Bill of Rights into each state's civil and criminal procedure. The court stated it as follows:

"*** (if) every State must thereafter initiate prosecutions through indictment by grand jury, must have a trial by jury of twelve in criminal cases, and must have trial by jury in common law

suits where the amount in controversy exceeds twenty dollars, is that it is a strange way of saying it."

The Wolf case presented the identical issue upon another federally protected right, freedom from searches and seizures. The Colorado law—similar to that now in effect in Nebraska does not bar use of evidence which has been obtained by ruse or other illegal methods. In the Wolf case a conviction obtained by presenting evidence thus illegally garnered was argued before this court, and the judgment of conviction upheld. The analysis in the opinion of the court prepared by Justice Frankfurter is as complete as could be any law reviewer's handiwork. The inescapable conclusion based upon the history of the state's handling of such procedures was that the provisions of the Fourth Amendment do not operate to exclude evidence in a state trial which may have been obtained by an improper search or discovered by improper means. The analysis of that opinion demonstrates that the habits and rules of the various states not conforming to Weeks v. U. S. (232 U. S. 383, 58 L. Ed. 652), obtained in such states in many cases prior to the adoption of the Constitutional Amendment itself. The court said:

"Granting that in practice the exclusion of evidence may be an effective way of deterring unreasonable searches, it is not for this Court to condemn as falling below the minimal Standards assured by the Due Process Clause a State's reliance upon other methods which if consistently enforced would be equally effective. *** We can not brush aside the experience of States which deem the incidence of such conduct by the police too slight to call for a deterrent rem-

edy not by way of disciplinary measures but by overriding the relevant rules of evidence. There are moreover, reasons for excluding evidence unreasonably obtained by the federal police which are less compelling in the case of police under State or local authority. The public opinion of a community can far more effectively be exerted against oppressive conduct on the part of police directly responsible to the community itself than can local opinion sporadically aroused be brought to bear upon remote authority pervasively exerted throughout the country."

This court has firmly adhered to a rule which permits the states to ignore the federal right to indictment by grand jury and to provide for prosecution upon information. *Hurtado v. California*, 110 U. S. 516, has been attacked numerous times and most recently in *Kennedy v. Walker*, 337 U. S. 901, wherein the court conceded its firm position in our law when it affirmed the judgment against a petitioner without even deeming an opinion necessary.

We carefully examined the Harris case (*Harris v. South Carolina*, supra) cited by petitioner as having some particular applicability to a person who does not speak English. We recognize that those who enter our boundaries from foreign soils may be a little lacking in constitutional knowledge. We note—extraneous of this record—that vast sums are appropriated annually for the assistance in education of those who properly enter through our ports with approved visas from their home land and their new land. Orientation assistance is given them and their contact with United States courts while preparing for citizenship is encouraged. These vistas were opened to Agapita

Gallegos had he chosen to await his time for proper entry into U. S. A. Instead he brings his adulterous companion into the country via "wet-back" route of sneak entry and then proposes through counsel that his ignorance of our law should entitle him to greater consideration before our state court than would an American citizen of equal comprehension receive. The Harris case is not applicable, and we reiterate, for there is nothing in the record to indicate stupidity on the part of the petitioner. To be sure, the literal translation of the Mexican to English verbiage brings about a rather halting, deliberate and somewhat romantic tenor to his statements (i. e. "She was telling me many things" seems to be synonymous with "She was still nagging at me" [R. 119]), but clearly his behavior was such as to indicate comprehension of his predicament. The early McNabb case turning upon a federal legal question only should not for that reason control this case. The Watts case, the Turner case, the Haley case (*Haley v. Ohio*, 332 U. S. 596) and the Harris case all involved examination by this court of a fact question and application of humanitarian principles to it notwithstanding the previous passing on of that question by a jury selected to try the accused. Each case presented a situation of repeated perpetual and unusual interrogation at odd and strenuous hours. In each case the defendant testified contrary to his statement at the trial. Petitioner here merely desires to use these cases and this court's humanitarian examination of official conduct as a bulwark behind which he may avoid punishment for his crime without ever needing to refute the testimony except by a change of his plea from "guilty" to "not guilty".

III.

This case was tried on the theory that a delay having occurred in appearance before a magistrate, nothing thereafter done by the prisoner could possibly have inculpated him. The result is a planned use of this court's sincere desire to protect persons actually oppressed as a complete shroud for the concealment of a hideous crime. It must be recalled that the accused himself by his shuttling about the country in international traffic rendered necessary the type of delays which surrounded his apprehension. It is significant to note that this court with respect to a federal case (*Mitchell v. U. S.*, 322 U. S. 65), relaxed the rule in the McNabb case and affirmed that post-confessional detention does not operate to render inadmissible a confession shortly after custody began, and that since the appearance before a magistrate at an immediately later or at a greatly later time could not possibly affect the voluntary nature of nor the trustworthiness of the confession it should not operate to nullify it. Mr. Justice Frankfurter wrote the opinion—not quite unanimous but as close to unanimity as has any case been since the weight of this perplexing problem fell upon and was accepted by this court, saying:

"In any event the illegality of Mitchell's detention does not retroactively change the circumstances under which he made the disclosures. These we have seen were not elicited through illegality ***"

This case answers the contention at page 19 of petitioner's brief, that we urge that necessary detention while awaiting transportation cannot retroactively operate to void the original voluntary confession. The

Haley case in no way tampers with the firmness of the language in the Mitchell case and the Haley case only states that continued *improper* detention is considered only in determining the credibility of the witnesses for the state with respect to the truth about the confession itself. Gallegos does not complain of any treatment after he made his first statement and it is already demonstrated clearly above that it is not unreasonable to wait from September 23 to September 27 for a sheriff to arrive from a point 900 miles away by bus.

We feel that the reasoning of the learned justices of this court in the opinions of *Lisenba v. California*, 314 U. S. 219 and *Lyons v. Oklahoma*, 323 U. S. 596, still sounds of intelligence. We feel that they are entitled to great weight in consideration of the problem here. Yet our study of the opinions of June 27, 1949, which opinions contain reference to the rule in such cases makes us aware that almost every present member of this court has already given consideration to the existence of those rules. We, therefore, make this our only reference to them and remind the court that both cases carried a long historical story of the repeated attempts to urge this court to change the *Hertado* doctrine, the *Twining* doctrine and other landmarks of the humane conflict between federal jurisdiction and state criminal procedure. Professor Inbau's article on what he regarded as a dilemma of this court (The Confession Dilemma in United States Supreme Court, 43 Illinois Law Review 442) has been cited already to this court in briefs we have examined. We do not enlarge this brief by quotations from it but we point out that it contains an ample statement of the elements which are necessary to protect society.

from rampant criminology. The broad knowledge of that authority with respect to the problems of discovering crime calls for respect to his suggestions. We know that this court is aware of the difficulty of drawing an exact line between what will amply preserve our individual rights and what will protect our society itself. The words of the chief justice in the communist cases indicate profoundly the terrific opposition of these two important questions.

In *Dennis et al v. United States*, — U. S., 95 L. Ed. — the court said:

"Chief Judge Learned Hand writing for the majority below interpreted the phrase as follows: 'In each case (courts) must ask whether the gravity of the "evil" discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger'. 183 F. (2d) at 212. We adopt this statement of the rule. As articulated by chief Judge Hand, it is as succinct and inclusive as any other we might devise at this time. It takes into consideration those factors which we deem relevant, and relates their significances. More we cannot expect from words."

We feel that Agapita Gallegos secured certiorari because of the repeated contentions that he gave up statements and plea after twenty-five days of oppression, interrogation, and confinement but that the record now before the court falls far short of establishing anything but a regular and proper inquiry into a murder first disclosed by the prisoner himself. We do not feel that the border-town police of the sovereign State of Texas have conducted themselves in any such way as to shock the conscience of this court.

Nor have the officials of the sheriff's office in Nebraska done so. Nor did the county judge in Nebraska do so.

In this connection we feel it most pertinent to point out that this court refused certiorari in the case of *Alex Agoston v. Pennsylvania*, wherein the petitioner sought to present to this court a case which he contended and which two of the justices here believed to be similar to the case of *Turner v. Pennsylvania*, 338 U. S. 62. Notwithstanding the scrupulous care used by the court to point out that it did not support the views of the opinion below (*Agoston v. Pennsylvania*, 72 Atl. (2d) 575, 75 L. Ed. 35) we earnestly point out to the court that the aggressive police methods there applied which involved persistent examination and as the dissenting justices point out "prolonged questioning" were much more vicious and could be said to be much more obviously calculated to bring about a confession which would not be a true one than those required for the apprehending and return to Nebraska of Gallegos in the instant case. That was a case in which an execution was ordered for first degree murder, here a ten-year sentence for manslaughter is considered.

Other Contentions of Petitioner.

VERIFICATION.

Petitioner states in his brief at page 18 that this confession was not verified. We disagree. The confession given in Texas led to an investigation in Scotts Bluff County which disclosed at the place described by the petitioner the body of his former mistress which he said was placed there by him. Much of the testimony was omitted from the record in this court but

we feel the opinion below amply demonstrates verification of the confession.

FEDERAL DETENTION.

Petitioner claims at page 22 of his brief that the Texas officers were in fact federal officers and that he is entitled to the absolute protection of the McNabb rule citing *Lustig v. U. S.*, 338 U.S. 74. We submit this argument is naive and shows no awareness of the true fact. Petitioner was charged as a vagrant. Nebraska claimed him before any federal authority took custody of him and the McNabb rule specifically does not apply. To accomplish what petitioner feels must be accomplished by the states would require reciprocal state enactments giving to magistrates in other states the power to inquire into probable cause for holding prisoners for crimes committed in remote places. Even this would not permit an early hearing for the process of travel must be reversed and the witnesses must be brought from the remote place to the point of arrest. Why we should accord our criminals the privilege of selecting another state within which to have their preliminary hearings simply by fleeing as a fugitive to that state is beyond the comprehension of the respondent and should be, we believe, beyond the thought of this court.

NEED FOR COUNSEL AT ALL STAGES.

It is claimed that Gallegos should have been furnished counsel at every stage of this proceeding. We view this record as one in which at the outset there was no offense known to either Texas or Nebraska officers at any stage of which Gallegos could have been furnished counsel.

No doubt Gallegos could have been given a trial upon the misdemeanor of being a vagrant. There is no showing that he would be entitled to counsel in such a case. His revelations while incarcerated would be admissible against him after such a trial whether given to a fellow prisoner, to the jailer or to the sheriff and the sole test is whether he gave them voluntarily. He even attempted to bargain for the release of his brother by offering to tell the truth. He voluntarily decided to speak and the truth which he told revealed far more than immigration violations which called for an examination into the cold-blooded murder of the missing Mexican person. So it is certain that until he divulged an hitherto unknown death at his hands, of which he had never told anyone, there was no charge upon which the laws of Nebraska authorize furnishing of counsel. At no earlier stage was he entitled to counsel at public expense. It is settled in Nebraska that an accused may not set aside his conviction upon the contention that his preliminary hearing was a trial at which counsel must be assured him. Such a contention was made and decided adversely to the defendant in *Roberts v. State*, 145 Neb. 658, 17 N. W. (2d) 777. There the court said:

"But, this decision need not rest on the procedural point alone. It is clear the preliminary hearing before the magistrate is not a criminal prosecution or trial within the meaning of section 11, art. I of our Constitution. It is in no sense a trial of the person accused. Its purpose is to ascertain whether or not a crime has been committed, and whether or not there is probable cause to believe the accused committed it. *Latimer v. State*, 55 Neb. 609, 76 N. W. 207, 70 Am. St. Rep. 403; *Van Buren v. State*, 65 Neb. 223, 91 N. W.

201; Adams v. State, 138 Neb. 613, 294 N.W. 396; R. S. 1943, Sec. 29-506.

"The rule is that in the absence of a statute a person accused of an offense is not entitled as of right to representation by counsel upon his preliminary examination. 16 C. J. Sec. 579, p. 324; 22 C. J. S., Criminal Law, Sec. 339, p. 498; Blanks v. State, 30 Ala. App. 519, 8 So. (2d) 450. Section 29-1803, R. S. 1943, requiring the court to assign counsel to an accused person in certain cases, who has not the ability to procure counsel, by its terms does not extend to the preliminary hearing."

CONCLUSION.

As throughout this brief we have borrowed from the language of the members of this court, now in our conclusion we borrow from the language of the petitioner as he was examined upon the stand relating to his confession for he more blandly than could we demonstrate the complete lack of any undue duress. He was asked (R.78, Q.1500): "Did he tell you he was going to turn you over to anyone?" and he answered: "That there was nothing said; there was no treatment of that kind. He just wanted to know who I was." He was asked (R. 88, Q. 1603-1604): "Agapito, Mr. Bailey did not ever strike you or beat you, did he?" A. "He has not; he just frightened me and told me he was going to take me in front of the Immigration." Q. "And no one ever struck you or beat you while you were in custody of the officers in El Paso, did they?" A: "No; they just frightened me." And further (R.90, Q. 1619-1623); Q. "What was it which they did which frightened you?" A. "Threatened." Q. "How did they threaten you?" A.

"The first time with a little machine that they were going to put on me. I don't recognize the machine; I don't know the machine." Q. "Do you know the name of the machine?" A. "I don't know." Q. "Were you told what the machine would do?" A. "No; they didn't tell me what that machine would do." Q. "Why did it frighten you?" A. "Because I don't know all of that—or I don't recognize all of that." And further, (R.94, Q: 1658-1660): Q. "Why were you frightened at that time?" * * * A. "Because it is the first time that I enter—the first time that the law takes me." Q. "Do you mean to say that you were nervous at that time?" A. "Uh-huh." Q. "But you were not afraid of being harmed bodily, were you?" A. "No."

There has never anywhere in this record been an attempt to deny the facts contained in the statement. It is not even inferred that the statement is other than truthful. In light of this technical opposition by the accused to the reception of his statement we feel it is most significant to point out that the evidence of any acts calculated to procure a statement other than a true one is very, very flimsy. True, the accused led by his counsel in examination recalled that he was possessed of fear of later punishment at the hands of Mexican police and that he was possessed of some other trepidation. Any of us, apprehended upon the slightest violation of law, would naturally and normally feel such fear of consequences. Perhaps Gallegos was not taken to the Hilton Hotel in El Paso for his examination. But if he were and if the officers had used the enticement of a fine hotel and a bountiful repast as his bonus for telling the truth, the confession would be as susceptible to attack as is the one obtained here. The test must be whether the conduct of the

interrogating officer is one of such nature as would produce an untrue confession of a capital crime. We earnestly submit that there does not appear in the record of this case any departure from orderly police methods of such tenor as would justify this court's adopting a rule which denies the state courts and the state juries of the opportunity to determine these important facts in a crime within the borders of that state.

Just as this court has, in the cases decided on June 20, 1949, served notice upon state authorities that it will not allow a conscientious reluctance to intrude upon state procedures to prevent its intercession in cases where utterly indefensible methods of "3rd Degree", have been indulged; so, in this case it should serve notice upon the underworld that the inclination of this court to intercede in such cases will not constitute an "iron curtain" behind which revelations of unwitnessed crimes may not be obtained at all.

We submit that the judgment of the trial court and of the Nebraska Supreme Court should not be disturbed.

Respectfully submitted,

CLARENCE S. BECK,

Attorney General State of Nebraska,

WALTER E. NOLTE,

Deputy Attorney General,

HOMER L. KYLE,

Assistant Attorney General,

Counsel for Respondent.

APPENDIX.

I.

Article I, Section 11, Constitution of Nebraska reads as follows:

"In all criminal prosecutions the accused shall have the right to appear and defend in person or by counsel, to demand the nature and cause of accusation, and to have a copy thereof; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf; and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed."

APPENDIX.

II.

Section 29-1803, Revised Statutes of Nebraska 1943, reads as follows:

"When any person shall be indicted for an offense which is capital or punishable by imprisonment in the penitentiary, the court is hereby authorized and required to assign to such person counsel not exceeding two, if the prisoner has not the ability to procure counsel, and they shall have full access to the prisoner at all reasonable hours. It shall not be lawful for the county clerk or county board of any county in this state to audit or allow an account, bill or claim hereafter presented by an attorney or counselor at law for services performed under the provisions of this section, until the account, bill or claim shall have been examined and allowed by the court before whom the trial is had, and the amount so allowed for such services certified by the court; Provided, no such account, bill or claim shall in any case, except in cases of homicide, exceed one hundred dollars."